The liberal elite sends their regards

Maximilian Steinbeis 2020-05-15T18:28:06

Andreas Voßkuhle and Peter Michael Huber, the two valiant German Constitutional Court judges of recent ultra vires fame, have launched a spectacular media campaign this week in their effort to set straight the allegedly skewed picture of their ECB judgment presented to the public by its critics last week. That, I'm afraid, didn't work out so well.

In three big-time newspaper Q&As, the outgoing President and his judge-rapporteur tried to explain and justify their decision, Voßkuhle in DIE ZEIT, Huber in the *Süddeutsche Zeitung* and, on the same day, in the *Frankfurter Allgemeine Zeitung*. I would summarise their communication strategy as follows: What's wrong with you, critics? Haven't we have been saying for decades now that the primacy of European law has its limits, among other things, in the competences that the Member States have transferred to the EU? Aren't we simply doing our job if we watch out for these ultra vires limits? And if we discover a transgression, what are we supposed to do? Just keep our mouths shut so the ECJ doesn't get angry? We are old *Verfassungsgerichtsverbund* buddies, you know, the ECJ and us. We like to kick one another's shins every once in a while in a special dialectical way, so that the other stays aware that you still exist. No hard feelings! And as for the Poles and Hungarians: Come on, guys! We, thank God, are not like those people, are we? We are the good guys after all. And if in future some Eastern European decoy constitutional court points at us and misuses us as a role model in their conflict with the ECJ, that's not our fault, is it? We are just a court, nothing more. Far be it from us to engage in politics! All we know is the law, and as any genuine German state examinated lawyer knows, it's all in there, in German constitutional law, we are bound to it, what can we do! Oh, and by the way, critics: We kind of resent your zealous tone, you know. What kind of discussion culture is that?

The interesting thing is, however, that in most critical statements, as far as I can see, there isn't even much critique of ultra vires control as such. You don't really need to even go there. The issue at hand is not *that* Karlsruhe watches over the limits of EU competences. It's *how* it does, and *when* – in this specific case, in this specific situation, with this specific reasoning. Which is not overly convincing, it seems. The idea that the ECB's failure to disclose why it considers its own policy proportional was so blatantly out of line that it was "arbitrary" and "plainly incomprehensible" that the ECJ did not criticise it: that, pardon me, is not exactly a no-brainer. As Judge Huber put it so nicely in his *Süddeutsche* interview: "If we had argued in a more friendly manner, the conditions for an Ultra-Vires act would not have been met." Well…, yes. Exactly.

I am aware, of course, that there are plenty of people in Luxembourg, Brussels and elsewhere who would prefer to seal off the EU against any constitutional intervention entirely, no matter what. This, however, is not necessarily what motivates the critics I have read, most of whom the Court simply failed to convince. Of course it is very

convenient to engage in swordplay with all kinds of europhile straw men and to paternalistically frown upon the uncivil manners of those who are upset about the weak basis of argumentation for such a momentous and risky act: harrumph, don't you forget who we are and who you are, will you? Well, I tend to agree with Judge Voßkuhle on this one: What kind of discussion culture is this?

Normality v. Abnormality

Andreas Voßkuhle's time in Karlsruhe has come to an end now. He will return to the powerful and influential *Staatsrechtslehrer* position he had before his term of office, and I am sure he will not tarnish the Court's reputation the way his predecessor as President did after leaving office. His successors were elected in the Bundesrat today, with Stephan Harbarth, the presiding judge of the First Senate, as the future BVerfG President, and Astrid Wallrabenstein, a professor from Frankfurt, as a member of the Second Senate, both no surprises. Wallrabenstein is a well-respected social law expert. The Greens, whose turn it was to nominate Voßkuhle's successor as a judge, couldn't make up their minds to present an assertive EU law expert who might bring about a sustainable cultural change in the Second Senate. That is unfortunate.

The Federal Constitutional Court has always taken pride in being a "court of the citizens", and under Voßkuhle's leadership this claim has taken on a very special tinge: Karlsruhe as a place of refuge for the "normal people", who can no longer find a forum in parliament for their concerns, a place where conflicts which the political establishment won't pick up for whatever reason can be settled in a peaceful and deliberative way. In his interview in the DIE ZEIT, Voßkuhle talks of the "big center", the "normal people", "all those who are not obviously discriminated against, but who tend to live a normal life under the radar". As opposed to whom? To the "liberal elites", who are "often more interested in people who are obviously discriminated against". They, according to Voßkuhle, are largely to blame for the fact that liberal democracy is losing ground to populism.

Where to begin? As if the distinction between normal and abnormal wasn't the mother of all discrimination. As if the "liberal elites", whoever they may be, owed equal interest and attention to both sides of this distinction in some sense of distributive justice. As if these "elites" are to blame for the fact that the "normal people" keep hating the guts of their discriminated protégés just as they always did, and consequently extend their hate to them.

I don't think I wrong Voßkuhle when I suspect that these "liberal elites" are largely the same people as those who are criticizing his judgment. In fact, these "elites" are liberal to the extent that they insist on justification. These are people who insist that no one can discriminate on the basis of office, rank or "normality" simply because they can.

So much for the attempt to set straight the public image of the BVerfG and its Ultra Vires judgement. Older Germans will perhaps remember the comedian Loriot, one

of the most wonderful products of pre-1990 West German television culture. Here is something I couldn't stop laughing about all week:

So, what has been going on on Verfassungsblog this week? Here is LENNART KOKOTT's overview:

The Federal Constitutional Court's ***ultra vires* verdict** continues to generate critical reactions that even prompted the court to launch a PR offensive this week. KAREN ALTER recommends the court to hold back on monetary policy issues instead of dropping out of the European judiciary. TONI MARZAL deals with the most astonishing wording of the judgement, turning it around and asking whether the decision of the FCC is not itself "simply incomprehensible" due to the skewed balancing of interests that the court is making. But it is not only jurisprudence and the public that have reacted critically; the European Commission did as well and has publicly thought about initiating infringement proceedings against the Federal Republic of Germany. FEDERICO FABBRINI argues that the Commission should do so as a matter of urgency. In Corona Constitutional #23, ALEXANDER MELZER talks to OLIVER LEMBCKE about the political sociology of the judgement. ANUSCHEH FARAHAT in conversation with MAXIMILAN STEINBEIS in Corona Constitutional #24, sheds light on the deeper problems of European politics that become apparent in the judgement. MARCO DANI, JOANA MENDES, AGUSTÍN JOSÉ MENENENDEZ, MICHAEL WILKINSON, HARM SCHEPEL and EDOARDO CHITI see political economy as an appropriate analytical framework for the judgment and argue that it could launch a debate on the institutional requirements of a genuine European Monetary Union.

PÄIVI LEINO-SANDBERG points to another case before a national constitutional watchdog with implications for **European financial and monetary policy** and presents the constitutional problems of Finnish participation in EU fiscal measures to combat the economic consequences of the coronavirus crisis and its political context.

The question of whether the right to life may be balanced with conflicting rights has emerged as a core problem of the **legal pandemic discourse** in Germany. STEPHAN WAGNER states that the general uncertainty in dealing with the coronavirus has also affected the normative sphere – but, he says, that is not necessary, since constitutional law already provides the criteria required to weigh the conflicting rights. Therefore, a balancing of rights including the right to life is possible. Meanwhile, legal questions concerning the Covid-19 pandemic increasingly concern the pandemic and non-pandemic future. FABIAN MICHL wonders whether an immunity card, which would have the aim of exempting supposedly immune persons from containment measures, threatens to classify citizens according to their status and feels reminded of feudal legal systems. GREGOR ALBERS looks at the self-employed and states that they bring a special sacrifice for which the state has to compensate them after the pandemic if it wanted to take the decision for a life plan as an expression of freedom seriously. CHARLOTTE HEPPNER points to another phenomenon of the pandemic. She deals with temporary bicycle tracks that

redistribute the street space between bicycles and cars in Berlin, and comes to the conclusion that it shouldn't take a virus to come up with good mobility policy ideas.

At the beginning of the pandemic, legal commentary on measures to combat the pandemic regularly made reference to **Carl Schmitt** as the notorious theorist of the state of emergency. In a two-part article REINHARD MEHRING shows that Schmitt – a contemporary of the Spanish flu – does not mention pandemics in his work (Part I). His categories could nevertheless be valuable in the legal debate on current measures, but they do not substitute a differentiated dogmatic description (Part II).

GIUSEPPE MARTINICO and MARTA SIMONCINI also deal with the way public law processes the **state of emergency**. They have no need for Schmitt and plead for a methodical reflection which should focus on thorough risk analysis. FRANCESCO PALERMO refers to federalism, which – albeit often disliked in constitutional law as a brake on effective government action – could demonstrate its strength in crisis management during the pandemic.

Criticism of the emergency measures in **Hungary** was described by the country's Minister of Justice as "an expression of a liberal dictatorship of opinion in Europe". IMRE VÖRÖS rejects this, but instead renews the criticism on the basis of an analysis of the constitutionality of the measures, and calls on the EU to act. That the Hungarian government is punishing and weakening the political opposition under the guise of the pandemic is shown by DÁNIEL KARSAI using the example of the city of Göd that could be the beginning of a more general practice.

Two country reports show the manifold dimensions of **separation of powers** and its shortcomings in the pandemic. RUIPING YE sheds light on the political role of courts in times of emergency by means of the rigid enforcement of containment measures by Chinese courts against citizens, which is confronted with a lack of legal prosecution of the politically responsible. In Serbia, all powers, not least the judiciary, have responded inadequately to the crisis, writes IVAN CAVDAREVIC, citing examples at both the substantive and procedural levels. But, he concludes, this escalation of problematic state action might also offer an opportunity for political renewal.

Presidential elections are coming closer in the United States (or are they?). The pandemic is likely to require mail-in vote, writes DANIEL E. WALTERS, and warns that the effect on voter turnout will depend on a flurry of organizational minutiae which are susceptible to political influence. In the long run, the introduction of a comprehensive mail-in voting system could in any case prove advantageous.

TAMAR HOSTOVSKY BRANDES deals with the result of an election: She presents the decision of the **Israeli Supreme Court** to reject petitions against a new term of office for Benjamin Netanyahu, who is indicted for corruption. Corruption is a social phenomenon and it is not within the power of a court to ignore or even change the public and political culture of a country single-handedly, she maintains.

In our current **debate** *Covid-19 and States of Emergency*, ANTOINE BUYSE and ROEL DE LANGE show that the Netherlands' efficient response to the pandemic, based on expert recommendations, could be at the expense of a debate about the underlying legal and political decisions. In Thailand, the legal form of containment of the virus has been accompanied by excessive measures and abuse of power, write KHEMTHONG TONSAKULRUNGRUANG and RAWIN LEELAPATANA. ANDRÉS CERVANTES examines the place of the pandemic in Ecuador's eventful constitutional history and shows what is at stake for the current constitution. Croatia, says NIKA BA#IC SELANEC in her contribution, is not yet on the threshold of autocracy as, despite harsh measures, the constitutional checks and balances are still working – but the response to the pandemic is nevertheless challenging the country's constitutional system. In Viet Nam, the crisis has made it apparent that the state needs to emphatically distinguish between emergency and non-emergency measures, states TRUNG NGUYEN. GIORGI CHITIDZE warns against an epidemic that affects the rule of law, democracy and human rights in Georgia. MIGUEL ÁNGEL PRESNO LINERA reports that in Spain, too, fundamental rights have not only been restricted but rather suspended, and that the scope of the constitutionally standardised state of alert has thus been exceeded. The Japanese approach, which is based on social pressure rather than legal penalty, presented by

AKIKO EJIMA, appears to be a contrast. ALLAN MALECHE, NERIMA WERE and TARA IMALINGAT present the challenges of the Kenyan response, which manages without a lockdown. Continued sensitivity to the fundamental and human rights implications of the measures in Lithuania is urged by EGLĖ DAGILYT#, AUŠRA PADSKO#IMAIT# and AUŠRA VAINORIEN#. ALICE DONALD and PHILIP LEACH argue that the pandemic does not necessarily require the suspension of human rights – rather, measures that recognise and emphasise individual rights could be more effective in the long run.

So much for this week. Did I mention that we still are under tremendous stress, churning out so many pieces day after day? We need to spend more money, and that means of course that we need to raise more money. Please open your purses, support us on Steady, or send us a one-off donation via Paypal (paypal@verfassungsblog.de) or via bank transfer (DE41 1001 0010 0923 7441 03, BIC PBNKDEFF). Thanks a million!

all best,

Max Steinbeis
